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No. 767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CONTINENTAL OIL COMPANY, A CORPORATION, PETITIONER
v.
STATE OF MINNESOTA

MID-CONTINENT PETROLEUM CORPORATION, A CORPORATION, PETITIONER
v.
STATE OF MINNESOTA

SINCLAIR REFINING COMPANY, A CORPORATION, PETITIONER
v.
STATE OF MINNESOTA

PHILLIPS PETROLEUM COMPANY, A CORPORATION, PETITIONER
v.
STATE OF MINNESOTA

SKELLY OIL COMPANY, A CORPORATION, PETITIONER
v.
STATE OF MINNESOTA

THE TEXAS COMPANY, A CORPORATION, PETITIONER
v.
STATE OF MINNESOTA

CITIES SERVICE OIL COMPANY, A CORPORATION, PETITIONER
v.
STATE OF MINNESOTA

BARECO OIL COMPANY, A CORPORATION, PETITIONER
v.
STATE OF MINNESOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION AND BRIEF IN SUPPORT OF PETITION

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA, AND BRIEF IN SUPPORT THEREOF

PETITION

Continental Oil Company, Mid-Continent Oil Company, Sinclair Refining Company, Phillips Petroleum Company, Skelly Oil Company, The Texas Company, Cities Service Oil Company, and Bareco Oil Company, all corporations, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in these causes on September 22, 1944 (R. 1037-8), reversing judgments of the District Court of the State of Minnesota, Second Judicial District (R. 985-986).

QUESTION PRESENTED

Whether gasoline in the terminal tanks of a common carrier by pipeline, transported thither through the pipeline from refineries in other states and thereafter transported thence by common carriers by rail to destinations beyond the pipeline terminal, may be said to have ended its interstate journey and to have become subject to local property taxation by reason of the pipeline carrier's adding of certain materials to the gasoline at that point, such adding having been found by the trial court to have been intended, not to serve the business purposes of the shippers, but only to facilitate operation of the pipeline system and the change of the method of transportation from pipeline to rail.

STATEMENT

These causes involve the constitutional validity of state property taxes on gasoline assessed against petitioners for the years 1933 to 1940, inclusive.

Petitioners are producers, refiners, and marketers of petroleum products, including gasoline. Included in their market-area are Minnesota and the proximate portions of Wisconsin and North and South Dakota, herein called the northern area. Marketing is effected through bulk-plants, which are depots of supply for service or filling stations and other retail outlets. Most of the bulk-plants have two or more tanks for the storage of gasoline, generally of a capacity up to about 20,000 gallons each, though some are much larger. (R. 235 (705),[1] 236-7 (708-11), 238 (713-4), 242 (726), 246 (737), 274-6 (820-6), 621-3 (1862-8), 631-2 (1893-5), 654 (1961-2), 670 (2008), 671 (2011), 677-9 (2029-35), 704

[1]Folio references are within parentheses following the page references, the whole being enclosed within parentheses.

(2112), 705 (2114), 707-8 (2120-4), 726-7 (2178-81), 732 (2194-6), 741-2 (2223-6), 743 (2228), 745 (2234), 749 (2246), 763-4 (2288-90), 765 (2294-6), 790 (2369-70), 791 (2373), 792-3 (2376-9), 885 (Findings 1 and 2), 901 (Finding 19); Exs. 100-107.)[2]

The bulk-plants in the case of each petitioner are divisible into two classes—those operated by the petitioner itself, and those operated by jobbers or distributors, generally referred to as contract customers. The latter hold long-term contracts, usually for a year and automatically renewable. The contracts provide for the purchase of gasoline and other products in quantities ranging between specified maxima and minima per year or per month. (R. 237 (711), 623 (1867), 629 (1887), 705-6 (2114-7), 727-8 (2181-3), 742-3 (2225-8), 766 (2297-8), 790 (2370), 795-6 (2385-6), 885 (Finding 2); Exs. 107, 110-114.)

Until in 1931 all-rail tank-car transportation from refinery to bulk-plant was used by all the petitioners in bringing gasoline into the northern area. In that year construction was completed by Great Lakes Pipe Line Company of a pipeline from points in Oklahoma and Kansas to terminals in the North, including one located north of St. Paul in Ramsey County, Minnesota, known as Minnesota Transfer Terminal, and petitioners since then have transported gasoline into the northern area for the most part by means of the pipeline from their refineries to Minnesota Transfer Terminal and by means of railroad tank-cars thence to the bulk-plants. (R. 242 (726), 256-7 (767-70), 272-3 (815-9), 288 (863), 610-1 (1829-33), 623-5 (1869-74), 633-4 (1897-1900), 638-9 (1913-5), 678 (2034), 681-2 (2043-6), 709-10 (2125-8), 727 (2180),

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[2]Except in details, the findings are substantially identical as to all petitioners. For convenience, therefore, we generally cite only findings made as to petitioner Phillips, which are the only findings set out at length in the record. (R. 906 (2716).)

729-30 (2186-90), 732-3 (2196-8), 743-4 (2229-32), 757 (2269-71), 768 (2304), 792 (2374-5), 797 (2390-1), 821-2 (2463-5), 901 (Finding 19), 926 (Finding 19), 934 (Finding 19); Exs. 125, 127, 128.) As required of common carriers in interstate commerce (Act of February 4, 1887, as amended, c. 104, 24 Stat. 379, 380 (49 U. S. C. §1 et seq.)), movement and handling of the gasoline by Great Lakes are effected at rates and under rules and regulations set out in tariffs filed with the Interstate Commerce Commission. (R. 283 (848-9), 565-7 (1693-9), 579-81 (1735-42), 886 (Finding 3); Exs. 150-153.)[3]

Operation of a system for the transportation of gasoline by pipeline is subject to the limitation that, where more than one grade is moved, each grade may be moved only in large lots. A relatively fixed quantity of each "slug" is contaminated by a gasoline of a different grade preceding or following it through the line, and, in case of the line to Minnesota Transfer Terminal, the loss by such contamination becomes prohibitive if the slug is less than 20,000 barrels (840,000 gallons) in size; the larger the slug, the less the loss. (R. 306 (916-8), 391-3 (1172-8), 411-2 (1233-4), 462-3 (1686-8), 891 (Finding 7).)

The foregoing limitation posed to Great Lakes two problems which had to be solved if the pipeline was to serve as a satisfactory and acceptable vehicle of transportation.

First problem and its solution. The requirement that only large quantities be moved through the line makes it impractical to carry to Minnesota Transfer Terminal as many dif-

[3]Until June 11, 1941, the only shippers over the pipeline were Great Lakes' shareholders. On that date the Interstate Commerce Commission ordered a rate revision under which the cost of a combination pipeline-rail movement for the first time became less than the cost of an all-rail movement, and non-shareholders thereupon came in as pipeline shippers. (R. 29 (86), 31-5, 287 (859-61), 308 (922), 610-1 (1829-33), 681-2 (2043-6).) Transportation by all-rail is faster than transportation by combination pipeline-rail. (R. 318 (953-4).)

ferent grades of gasoline as there are varying specifications marketed in the northern area by Great Lakes' shippers, the specifications so marketed at one time being as many as twenty-six in number, and the amount of business potentially available would be reduced substantially were not Great Lakes able to equip itself so as to reship from the terminal approximately as many different specifications as market-demands require. (R. 325-6 (974-7), 329 (985-6), 424-5 (1272-3), 558-9 (1672-6), 891 (Finding 8), 892 (Finding 9).)

Solution of this problem lay in the facts that the numerous specifications marketed consist on an average of only six and at most of seven different basic grades of gasoline, and that conversion of these few grades into the more numerous specifications involves simply the adding of one or more different materials to most, but not all, of the gasoline, these materials being identifying color, lubricant or solvent, natural gasoline, and tetraethyl lead. (R. 387 (1160-1), 408 (1224), 409 (1227), 559-60 (1675-8), 890-1 (Findings 7 and 8).) For example, the third-grade gasolines marketed in the northern area by shippers over the pipeline are all of the same basic grade, and the same is true of the "regular" or housebrand gasolines marketed by the majority of the shippers (R. 302 (905), 322 (964-5)); in the case of a common grade the gasoline of each company, while classifiable as a separate specification, may differ from other gasolines of the same grade only as respects the particular color added (R. 559-60 (1675-8)).

Great Lakes met this operating problem by providing in its tariffs that it would without additional charge render the services incident to the adding of the materials—called "blending-in-transit" in the tariffs—provided the cost of materals be paid by the shipper. (R. 893-4 (Finding 11); Ex. 150, I. C. C. No. 79, Item 90.) The adding of the materials is done at the terminal. The adding of color is accom-

plished simply by an attending employee's dumping about a handful of coloring matter into a railroad tank-car while the latter is being filled. (R. 409 (1225), 556 (1666-8), 895 (Finding 12a); Ex. 129.) The coloring of the gasoline is required by state law in certain cases where tetraethyl lead is added to gasoline (Mason's Minnesota Statutes 1927, 1940 Supp. Sec. 3787-16), and this requirement has applied to all housebrand gasolines since in 1933 and to most third-grade gasolines since in 1939. (R. 310 (929), 322 (965-6), 425-6 (1274-6), 519-21 (1557-62), 524-32 (1570-96), 562 (1684-5), 646 (1936-8), 720-1 (2160-2), 737 (2210-1), 740 (2219), 753 (2257), 755 (2264), 771 (2313), 803-4 (2409-10), 895 (Finding 12a).)

The natural gasoline is likewise added while the tank-car is being loaded and is accomplished by an attending employee's closing one loading-rack valve and opening another. Such adding has been done for only three of the petitioners, all of whose basic grades have been identical, and is done in such varying ratios as the respective shippers request. Natural gasoline is a motor fuel of high volatility, which during seasons of low temperature is added to other gasolines to make motor-starting easier. (R. 406-7 (1218-21), 419-21 (1257-61), 554 (1660-2), 563 (1688), 739-40 (2216-8), 895-6 (Finding 12b), 907 (2720), 910-11 (2730-1), 913-4 (2739-40); Ex. 128.)

A lubricant has been added to the gasoline of one of the petitioners, and for a period apparently to that of another, both petitioners being shippers of identical basic grades. The lubricant is kept in small tanks furnished by the shippers—the only facilities at the terminal not owned by Great Lakes—,[4] and is pumped into the tank-car while the gasoline

[4]Prior to March 2, 1936, but not thereafter, Great Lakes' tariffs stated that terminal-tankage should be provided by the shippers. On that date the tariffs were amended so as to conform with the practice. Ex. 150 (cf. Items 55, 60,

is being loaded. A solvent has also been added to the gasoline of a shipper not a party to these proceedings, the method being about the same as with the lubricant except that the solvent has been run into the tank-car in advance of loading of the gasoline. (R. 317-18 (951-2), 362 (1084-5), 554-6 (1662-6), 561 (1681-3), 737 (2210), 740 (2219), 896 (Finding 12c), 907 (2721), 911 (2731).)

Unlike the other materials, the tetraethyl lead, which is an anti-knock medium, must be added while the gasoline is in the terminal tanks. The gasoline is run out of and into the tank under pressure through two circulating pipes running from the tank to a circulating pump, the proper amount of lead being injected through the pump during the first part of the process. About six hours' circulation is necessary. The proportion of lead to gasoline is very small quantitatively, about one to four thousand on an average, and the cost of leading is only about one-twentieth of a mill per gallon. (R. 302-3 (906-9), 322-4 (966-70), 393-7 (1179-90), 402 (1206), 530-1 (1588-91), 535-6 (1605-8), 896-7 and 980 (Finding 12d).)

Aside from its relation to the foregoing problem created by a pipeline's inability to transport more than a limited number of grades of gasoline, the adding of the tetraethyl lead at the terminal has on other grounds been a matter of policy with the carrier. Leaded gasolines were marketed in the northern area by all the petitioners before construction of the pipeline, the lead being added at the refinery. However, tetraethyl lead is recognized as highly dangerous to health, and because of uncertainty as to what effect contact with leaded gasoline might have upon employees' health, Great Lakes at the outset adopted and has since adhered to the policy of carrying only unleaded gasolines through its

and 65 of I. C. C. No. 22 with Items 55-A, 60-A, and 65-A of Supp. No. 12 to I. C. C. No. 36).

lines and instead offering under the conditions already noted to cause the lead to be added at its terminals. It did this, notwithstanding that facilities for leading were available at the refineries and that the shippers in fact preferred that the lead be added there. (R. 268 (802-3), 283-5 (849-55), 331-2 (992-4), 397-400 (1190-1200), 401-3 (1203-7), 425 (1274-5), 625-6 (1874-7), 733 (2198-9), 822 (2465-6), 830-4 (2490-2501), 892-3 (Finding 10), 902 (Finding 20); Ex. 126.)

The second problem and its solution. Since a line of pipe can deliver only one grade at the time and then only in large quantity, several days—sometimes as many as 20 or 25—may elapse between receipts of two different lots of the same grade. A satisfactory transportation system requires, on the other hand, that there be a continuous flow of all the different grades away from the terminal and to the bulk-plants, which, in the typical case, can each receive at one time not to exceed one-hundredth the quantity of the minimum-sized slug; on an average only about two different grades reach Minnesota Transfer Terminal each day, whereas approximately 15 or 16 different specifications are reshipped therefrom by rail each day. This problem of co-ordination Great Lakes solved by providing tankage at the terminal of capacities sufficient to hold enough of each grade to permit reshipment by rail of that grade during the intervals when only other grades could be received at the terminal. (R. 389-90 (1166-8), 391-3 (1172-8), 414-6 (1241-7), 546 (1636-7), 548-50 (1644-50), 557-9 (1671-5), 899-900 (Finding 16).)[5]

Further summary of other salient facts follows.

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[5]Great Lakes' president was of opinion that gasoline remained at the terminal an average of 35 days. (R. 307-8 (921-2).) Its general superintendent in charge of physical operations estimated "several days". (R. 415 (1243).) At times the terminal tanks have been so low that reshipments have been impossible. (R. 551 (1652).)

Operation of the pipeline necessitates the giving by a shipper of advance notice of a proposed shipment so that the carrier will be in position to receive the gasoline when tendered, and thereafter, by co-ordinating the same with other proposed shipments, to provide for its systematic movement through the line, which requires from 25 to 30 days from Oklahoma to Minnesota Transfer Terminal. To this end prospective shippers are supplied with forms for monthly submission to the carrier wherein are set out forecasts of the shipments which they propose to make during the ensuing three months. (R. 318 (953), 372-3 (1114-8), 377-8 (1130-4), 379-80 (1137-40), 412-3 (1235-8), 421-3 (1261-8), 436-40 (1306-20), 442-450 (1326-49), 501-2 (1501-4), 57-82 (Exs. 6-A to 14-C, inc.), 131-148 (Exs. 17-A to 21-C, inc.), 193-221 (Exs. 27-A to 36-C, inc.), 897-8 (Finding 14); Exs. 130-132, inc.) These forecasts and the tenders subsequently made are in turn based on estimates which petitioners make from time to time of the requirements of their own bulk-plants and of the bulk-plants of their contract customers, and no gasoline is brought to the terminal for the purpose of being held there while customers are sought out. (R. 245-6 (735-7), 247 (739), 269-72 (807-14), 334-5 (1002-5), 337-8 (1011-3), 477 (1429-31), 481 (1441-2), 550 (1649-50), 634-5 (1901-5), 636 (1906-8), 687-9 (2059-67), 714-8 (2140-54), 731 (2191-3), 747-8 (2241-3), 750-1 (2249-52), 758-9 (2274-6), 769 (2306-7), 776-8 (2327-33), 781-2 (2343-5), 786 (2356-8), 794-5 (2380-5), 809-12 (2427-35), 825 (2474-5), 897-8 (Finding 14), 900 (Finding 17); Exs. 141-148.) Furthermore, practically all the gasoline when reshipped from the terminal is in fact carried to such bulk-plants; a small proportion—less than 1% over-all, and none whatever in the case of at least two if not three of the petitioners—is transported to "spot-sale purchasers", that is, purchasers with whom no contract relations exist at the time of tender, the

quantity purchased usually being one tank-car. (R. 263-7 (788-99), 629-31 (1886-92), 649-51 (1947-52), 679-81 (2035-42), 683-4 (2048-52), 711-3 (2132-8), 727-8 (2181-2), 734-5 (2201-5), 745-6 (2235-8), 779-80 (2335-8), 812-6 (2436-46), 902-3 (Finding 20).)

It is impracticable to maintain physical identity of gasoline by lot or tender once it enters the pipeline system, segregation being practiced only in respect of grades. (R. 453-4 (1360-62), 495 (1483-4), 496-7 (1487-90), 499-501 (1497-1501), 540-6 (1618-37), 898-9 (Finding 15); Ex. 150, Supp. 2 to I. C. C. No. 79, Item 16.) Determination of when and with what continuity a particular grade shall be moved is governed by what to the carrier appears necessary to fulfill its obligations to effect transportation to the terminal so as to permit reshipment by rail. (R. 540-6 (1618-37), 898-900 (Findings 15 and 16).) When a grade common to two or more shippers arrives at the terminal, Great Lakes may treat the gasoline as that of only one shipper or may proceed to allocate it among several shippers, all in the light of Great Lakes' obligations to the various shippers by whom such grade has been tendered. (R. 454-6 (1361-7), 898-900 (Findings 15 and 16).)

Great Lakes' tariffs are entitled "local" and "proportional". (Exhibit 150; R. 886 (Finding 3).) "Local" rates apply to gasoline destined to bulk-plants within the railway switching districts of Minneapolis and Minnesota Transfer, within both of which districts lies Minnesota Tranfer Terminal. (R. 570 (1708-9), 574-5 (1722-3).) "Proportional" rates are applicable in respect of other destinations located in the northern area. Such a rate is in the tariffs announced for each such destination, and represents Great Lakes' part of a through rate for a combination pipeline-rail movement from the receiving point to that destination. (R. 567-9 (1700-6), 571-2 (1711-1716); Ex. 150.) A single

movement of gasoline through the pipeline of necessity far exceeds in quantity the gasoline reshipped by rail to any particular destination (R. 602 (1805-6)), and the shipper is required in the first instance to pay Great Lakes the local rate to the terminal, which is the only destination announced at the time of tender (R. 572 (1714-16)). The proportional rate is thereafter made applicable by way of refund to the shipper by Great Lakes of the difference between such rate and the local rate already paid, the shipper being required for that purpose to submit evidence of payment of the rail charges. (R. 572 (1716), 582 (1744-5), 583-7 (1749-59); Ex. 150, I. C. C. No. 79, Items 40 and 45; Exs. 155 and 156.) Noted on all railroad bills of lading covering movements subject to the proportional rates is the state of origin of the gasoline, and the Interstate Commerce Commission in later years has required inclusion in the tariffs of a rule to this effect. (R. 476-483 (1428-1447), 589 (1767), 663 (1988-9); Exs. 142, 144, 146, 148, 157, 158; Ex. 150, Supps. Nos. 1 and 2 and I. C. C. No. 79, Items 125 and 125-A, respectively.) Approximately 75% of the gasoline passing through Minnesota Transfer Terminal goes to destinations in Minnesota and 25% to destinations in other states. (R. 533 (1597), 900 (Finding 17).)

Shipping by combination pipeline-rail rather than all-rail has not resulted in any reduction to petitioners in their necessary storage facilities or personnel or in any change in marketing practices. (R. 632 (1895-6), 685 (2055), 719 (2155-6), 735-6 (2205-6), 751-2 (2253-4), 781 (2342), 797-8 (2391-2), 901-2 (Finding 19).)

In addition to finding the substance of the foregoing facts, the trial court found as to the years in issue that it was the intention of each petitioner, upon tender of gasoline to Great

Lakes for transportation, that the gasoline should by the latter be delivered into the custody of connecting rail carriers for further transportation to bulk-plants in the northern area operated by the petitioner or by its contract customers; that it was all so transported to such bulk-plants except, in the case of some of the petitioners, to the small extent that sales were made to spot-sale purchasers; that transportation to such spot-sale purchasers "constituted occasional en route diversions" from the rail destinations beyond the terminal originally intended to different rail destinations, likewise beyond the terminal; and that physical interruption of the gasoline at the terminal and the adding of materials there "were not designed or intended to serve the business purposes or profit of the shippers thereof, but were designed and intended solely to serve as accommodation and facilitation to operation of the Great Lakes system as a common carrier of gasoline by pipeline and to the change at Minnesota Transfer Terminal of the method of transportation from pipeline to rail," and that "such interruption and such adding were reasonable with relation *** [to] such accommodation and facilitation." (R. 902-3 (Finding 20), 900-1 (Finding 18).) Upon the basis of these facts, the trial court concluded as a matter of law in the case of each petitioner that the gasoline at the terminal on each tax day "was in course of transit in interstate commerce" and was not within Minnesota's taxing jurisdiction. (R. 905.)

Upon appeal the Minnesota Supreme Court (by a four to two decision, one justice not participating) reversed the trial court. (R. 990-1013.) The principal grounds for the decision appear to be that, though the gasoline when tendered to Great Lakes "is destined ultimately for the consignor's trade throughout the northern area", neither the petitioners nor the carrier "knew at that time the particular bulk stations *** to which the gasoline is to be reshipped from the

tank farm" (R. 994); that "ingredients were added to some of the gasoline" (R. 996); that there is "no room" for a finding that the adding and interruption at the terminal facilitated transportation (R. 1003); and that the findings to the contrary "are but inferences in the nature of conclusions" and "are not entitled to any more weight than a conclusion of law" (R. 1004). A petition for rehearing was denied and judgment entered reversing the trial court. (R. 1037-8.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Minnesota Supreme Court erred in holding that the interruption of the physical movement of the gasoline and the adding of materials at Minnesota Transfer Terminal did not facilitate transportation.

2. It erred in holding that there is no evidence to support the trial court's finding that such interruption and adding were intended to facilitate transportation.

3. It erred in failing to hold that the evidence requires a finding that such interruption and adding were intended to facilitate transportation.

4. It erred in holding that the finding of the trial court as to the intent of such interruption and adding is in the nature of a conclusion of law and not a finding of fact.

5. It erred in holding that the gasoline at the terminal was not in course of transit in interstate commerce and that the movement by pipeline and the movement by rail were in law separate journeys.

6. It erred in failing to hold that imposition by the State of Minnesota and its governmental subdivisions of taxes on

gasoline at the terminal constitutes a burden on commerce among the several states, in violation of Section 7 of Article I of the Constitution of the United States, and deprives petitioners of their property without due process of law and denies them equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

7. It erred in entering judgment reversing the judgments entered in the trial court.

REASONS FOR GRANTING THE WRIT

1. So far as we are aware, these causes bring to this Court for review for the first time the question of the constitutional validity under the interstate commerce clause and the due process and equal protection clauses of a state property tax laid on gasoline in the possession of a common carrier by pipeline at the carrier's terminal while awaiting reshipment to destinations beyond the terminal.

We believe that in only one previous case has this Court had occasion to consider the relationship of terminal activities of a common carrier of gasoline by pipeline to the constitutional validity of a state tax. That case is *Phillips Pipe Line Co.* v. *State*, 302 U. S. 642, wherein *State* v. *Phillips Pipe Line Co.*, 339 Mo. 459, 97 S. W. (2d) 109, was affirmed per curiam on authority of *Eastern Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, and *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. 148. However, the *Phillips* case involved an excise tax on the carrier, whereas the present causes involve taxes on the shippers' gasoline. And, furthermore, the *Phillips* case was different upon its facts, for the reasons, among others, that the defendant there was carrying on blending operations not engaged in at Minnesota Transfer Terminal, and that, contrary to what is true here,

the gasoline was delivered into the shipper's custody at the terminal and there was no showing that the blending had any relation to facilitation of transport by pipeline.

2. The question presented by the petition is one of unusual and widespread importance. While long-distance movement of gasoline by pipeline is a relatively recent development (the Great Lakes system being the pioneer enterprise except for a converted eastern crude oil line much shorter in length), growth of this method of transportation has been rapid, a particular impetus to the trend to this method being given during the last few years by the impact of war conditions, and at the present time a network of gasoline pipelines is in operation in the eastern half of the United States. There are today at least 19 companies operating pipelines for the transportation of gasoline, not less than 13 of them common carriers. These 13 have 133 terminals in 21 different states, and we understand that it is established practice at most if not all of these 133 terminals to add to the gasoline one or more of the materials added at Minnesota Transfer Terminal. Some of the petitioners are regular shippers over gasoline pipelines other than the Great Lakes system.

So far as the Great Lakes system alone is concerned, it may be pointed out that in addition to Minnesota Transfer Terminal, there are two terminals in Iowa and one each in Nebraska, Kansas, and Illinois, and that the petitioners and others are shippers through all these terminals. Operations at these other points are carried on precisely as at Minnesota Transfer Terminal.

While no taxes have been laid on shippers of gasoline at the Great Lakes' terminals in the four states other than Minnesota, the same question can of course arise in any or all of them.

There is plain need under the circumstances for an au-

thoritative decision from this Court for the guidance of both shippers and tax administrators. It is believed that the record in the present cause is adequate fully and fairly to present the controlling issue; the showing of the petitioners is comprehensive, and it will be observed that the findings of the trial court (R. 885-905) are full and complete, with the added merit of conciseness.

In the latter connection, it may be observed that the Minnesota Supreme Court points out repeatedly (R. 990, 994, 1003, 1004) that the facts are "undisputed". And so, while this Court, as said in *Great Northern R. Co.* v. *Washington*, 300 U. S. 154, 165, is not "concluded by a finding of fact or a mixed finding of law and fact made by the state court" but "must examine the evidence to ascertain whether it supports the decision against the claim of federal right", the controversy gives no occasion, to borrow from the language of *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 143, "to determine issues of fact arising on conflicting testimony or inferences" but only "to perform our own proper function in deciding the question of law arising upon the findings which the evidence permits." As was true of the appellate state court in the *United Gas* case (p. 143), so in the present matter, under established state practice the Minnesota Supreme Court is without authority to make findings of fact. See *Brennan* v. *Friedell*, 212 Minn. 115, 118, 2 N. W. (2d) 547.

3. There is grave doubt as to whether the decision of the Supreme Court is in accord with applicable decisions of this Court. As shown in the brief in support, the majority opinion seems to have failed to apply what has heretofore been deemed controlling principle as announced by this Court, and it proceeds in part without regard, apparently, to the clearly-established operating problems of the pipeline carrier

and in part on misunderstanding of the petitioners' contentions.

So far as these particular petitioners are concerned, the decision of the Minnesota Supreme Court is of more than common seriousness. The tax is of course an annually-recurring one, and presumably the decision in the present causes is for all times *res judicata* as to the petitioners so far as Minnesota taxes are concerned.

Wherefore it is respectfully submitted that the petition should be granted.

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December 1944

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The findings and memorandum opinion of the Minnesota District Court (R. 884-906, 981-4) are not reported. The opinion of the Minnesota Supreme Court (R. 990-1013) is reported in 15 N. W. (2d) 542.

STATEMENT AS TO JURISDICTION

1. *Statutory provision.* The statutory provision believed to sustain the jurisdiction of the Court is Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

2. *Date of judgment.* The judgment of the Supreme Court of the State of Minnesota, which is the highest court of the State of Minnesota, was entered September 22, 1944. (R. 1037-8.)

3. *Nature of case.* The case involves a right or immunity specially set up by the petitioners under the Constitution of the United States. The petitioners contend that gasoline shipped by them by a combination pipeline-rail movement from a point in one state to a destination in another state is in the course of an uncompleted interstate journey while in the custody of the pipeline carrier at its terminal awaiting reshipment by rail, and hence exempt from state tax at that point under the commerce and due process and equal protection clauses. It is believed that the jurisdiction of the Court is sustained by *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 650, 651.

4. *Substantial character of question.* Considerations indicating the substantial nature of the question are set out in the petition under the heading "Reasons for Granting the Writ".

5. *Stage at which and method by which question was raised.* The question of the constitutional validity of the tax was by each petitioner raised in the court of first instance by alleging in its answer, the original pleading, that "The gasoline *** was not subject to tax by the plaintiff [State of Minnesota] or by any of its governmental subdivisions, for the reason that it was in transit in interstate commerce", and that collection of the tax would "constitute an unlawful invasion and usurpation by the plaintiff and its governmental subdivisions of the power given the Congress by Section 8 of Article I of the Constitution of the United States of America to regulate commerce among the several states and would constitute an unlawful burden upon such commerce; would deny to the defendant the equal protection of the laws, in violation of *** Section 1 of the Fourteenth Amendment to the Constitution of the United States of America; and would deprive the defendant of its property without due process of law, in violation of *** Section 1 of the Fourteenth Amendment to the Constitution of the United States of America." (R. 7.)

6. *Way in which question was passed upon below.* The trial court found as a conclusion of law that "The gasoline *** was in course of transit in interstate commerce, was not a part of the mass of property in this state, and was not subject to the taxing jurisdiction of this state"; that "carriage by rail of said gasoline from Minnesota Transfer Terminal to rail destinations in the northern area was not in law a journey separate from the carriage thereof by pipeline"; and that "The assessments *** are null and void"; and the trial

court directed judgment accordingly. (R. 905.) The Minnesota Supreme Court, by split decision, reversed the trial court "with directions to enter judgment in favor of the State". (R. 1005, 1038.)

QUESTION PRESENTED, STATEMENT OF THE CASE, ETC.

A statement of the question presented, a statement of the case, and a specification of errors to be urged are set out in the petition.

ARGUMENT

The Appellate Decision Below Either Denies the Relevancy of the Purpose of the Interruption at the Terminal, or Determines the Existence of Such Purpose in the Light Only of the Remaining Rail Movement

In a short memorandum appended to its order directing judgment for the petitioners, the trial court pointed out (R. 981-2 (2942-5)) that the state's theory in essence was that "it is the nature of the operations" at the terminal, "not the purpose motivating them, that is controlling," whereas this Court in *Minnesota* v. *Blasius*, 290 U. S. 1, had declared (p. 10) that consideration must be given to the "purpose of the interruption", and that the evidence demonstrates that the purpose of what was done at Minnesota Transfer Terminal was to facilitate transportation. The opinion of the two dissenting justices on appeal likewise points out (R. 1006) that the controlling principle is whether the purpose of the interruption was to facilitate transportation, and (R. 1009) that "there is substantial evidence reasonably to sustain the finding" that such was the purpose in this case.

While the prevailing appellate decision of course does not

openly repudiate the doctrine of the *Blasius* case, the effect of the decision at the very least is to narrow the application of the doctrine by hedging it about with a new and hitherto unannounced limitation, namely, that the finding as to the purpose of the interruption must be based, in such a case as the present, only on such facts as relate to the problem of moving the gasoline *away from* the terminal, not on such facts as relate to the problem of getting the gasoline *to* the terminal. The purpose is tested, in other words, in the light only of the exigencies of the remaining rail movement, not in the light of the exigencies of the completed pipeline movement.

The singular circumstance is to be noted in this connection that of all the facts found by the trial court —and their substance is recounted in the petition—only that finding (No. 18—R. 900-1) is attacked in the majority opinion below, either on the ground of lack of support in the record or on any other ground, which relates to the purpose of the interruption of the movement at the terminal. Nowhere in the prevailing opinion is it even suggested, for example, that the evidence is not ample to support the finding (No. 7—R. 890-1) that, because of contamination, gasoline can be carried through the pipeline only in quantities far exceeding the capacity of any single bulk-plant to receive, or the finding (No. 9—R. 892) that it is impracticable to carry through the pipeline, as separate units, as many different kinds of gasoline as are marketed in the northern area and that the pipeline would lose custom were arrangements not made to correlate pipeline limitations to shipping demands, or the finding (No. 11—R. 893-4) that the color and other materials are added at the terminal with a view to overcoming the effects of such limitations, or the finding (No. 14—R. 897-8) that the tender forecasts are based on the anticipated requirements of the established bulk-plant

outlets. Indeed, none of these facts is even so much as mentioned in the prevailing opinion, and the only rational conclusion possible under the circumstances is that the majority was of the view that the purpose of the interruption at the terminal, if of any consequence at all, must be found without regard to them.

Analysis of the considerations deemed by the majority to be controlling as to the purpose of the interruption confirms this conclusion. At only two places in its opinion does the majority assign any reasons for its denial that the purpose of the interruption could have been to facilitate interruption. At the first of these places it is stated (R. 996) that such could not have been the purpose because "ingredients" were added to the gasoline. And at the second of these places it is stated (R. 1002) that such could not have been the purpose because "rail transportation was at all times available."

These statements and the failure even to mention the salient operating problems of the pipeline carrier indicate quite plainly that in the minds of the majority of the judges below the decisive test of the purpose of the interruption is whether what was done at the terminal facilitated the continuing tank-car movement by rail, and that since it is obvious that it is not easier to load or move a tank-car of gasoline if there is color or lead in the gasoline than if no color or lead has been added, it may not be said that what was done at the terminal was directed to facilitating transportation. What the majority below has done is to place itself mentally at the pipeline terminal and to look only in one direction—toward the bulk-plant—instead of considering the problem of transportation as it appears when viewed from the refinery. It seems fair to say that this is due to failure to guard against thinking in terms of traditional types of transportation, and to failure to appreciate fully the factors

that are of practical importance in the operation of a relatively new instrument of commerce. If the approach reflected by the opinion sought to be reviewed is the proper one, it means in effect that a pipeline-rail movement of gasoline from refinery to market can never in contemplation of law constitute a single journey where, as here, the varying specifications which it is required be carried to market are more numerous than the different grades which most economically or feasibly can be transported through the pipeline.

Failure Initially to Designate Ultimate Destination Is Not Controlling

The prevailing opinion below repeatedly refers (R. 994, 996, 1002) to the circumstance that the particular bulk-plants to which carriage of the gasoline is made are not designated or known at the time the gasoline is delivered into Great Lakes' custody. It is not clear whether the majority regards this circumstance as fatal to the petitioners' cause, but it is evident from the stress laid on the point that the circumstance strongly influenced the result.

This Court has made it plain several times that neither absence of designation of ultimate destination (*United States* v. *Erie R. Co.*, 28 U. S. 98, 102, and *Baltimore & O. S. W. R. Co.* v. *Settle*, 260 U. S. 166, 177) nor lack of knowledge of exact destination (*Carson Petroleum Company* v. *Vial*, 279 U. S. 95, 108, and *Texas & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 125-126) is necessarily fatal to or inconsistent with the existence of a single journey in contemplation of law. Furthermore, knowledge of exact destination is impossible in the case of such a pipeline-rail movement as that passing through Minnesota Transfer Terminal. While the quantities tendered to Great Lakes for transportation are based on the anticipated requirements of the es-

tablished market outlets (Findings 2 and 14—R. 885-6, 897-8), it must be borne in mind that no single bulk-plant can on an average receive more than one-fiftieth of the minimum quantity which it is practicable to carry through the line (Finding 7—R. 890-1).

In the light of these facts it is obvious that if knowledge as to exact destination is indispensable to the existence of a single journey in contemplation of law, then in the case of modern pipeline-rail transportation the standard is attainable only by such shippers as are possessed of the gift of divination. We are reluctant to believe that the law sets a price which no one can pay. Each petitioner in the present causes intended when it made delivery to Great Lakes that the gasoline should be carried to such bulk-plants as were its established outlets, and the gasoline was in fact so carried; but it manifestly could not know thirty or more days in advance whether, in case it had one hundred such outlets, Bulk-Plants Nos. 1 to 50 would be ready to receive the gasoline rather than Bulk-Plants Nos. 51 to 100, or the exact day on which each individual member of the receiving group would have depleted its pre-existing supply to an extent permitting receipt of another tank-car.

Manifestation or knowledge of intended destination beyond the bounds of physical possibility can scarcely be the test. Intention as to destination is evidenced by what is done in practice, viewed in the light of the limitations to which all humans are subject.

The Trial Court's Finding as to the Purpose of the Interruption Is Not a Conclusion of Law

In manifest response to what this Court said in the *Blasius* case (see R. 981-2 (2943-5)), the trial court made a finding of fact (No. 18, R. 900-1) as to whether the inter-

ruption at the pipeline terminal was designed "to serve the business purposes or profit of the shippers" or "to serve as accommodation and facilitation" to transportation. Had the trial court failed to make a finding on this point, its findings would quite plainly have been incomplete.

After stating, without referring at any place to the salient operating facts established by the evidence, that the foregoing finding is "opposed to the undisputed facts", the prevailing appellate opinion makes the assertion (R. 1004) that the finding was "in the nature" of a conclusion and was "not entitled to any more weight than a conclusion of law". To us this seems most obvious error. In *Colorado Nat. Bank* v. *Commissioner*, 305 U. S. 23, 26, this Court said that "Dominant purpose was a question of fact". Elsewhere it has been said that "The state of a man's mind *** is as much a fact as is the state of his digestion." *Swift* v. *Rounds*, 91 R. I. 527, 35 A. 45, 46.

To cast aside the finding as to the purpose of the interruption as being a conclusion manifestly nullifies the principle of the *Blasius* case if we are to take what is there said at face value, and the effect, if what the Minnesota Supreme Court has done is permitted to stand, is to transgress what is said in *Davis* v. *Wechsler*, 263 U. S. 22, 24:

> If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the [Federal] right or to bar the assertion of it even upon local grounds. ***

As supporting authority the prevailing opinion quotes (R. 1004) from *Baumgartner* v. *United States*, 322 U. S. 665. We think that this is to misinterpret the *Baumgartner* decision. What that case held was that for purposes of appellate review it may be necessary, "in examining the foundation for findings", to draw a distinction between findings

of "subsidiary" facts and findings of "ultimate" facts based thereon, and that the Court will more readily undertake review of the latter than of the former, particularly where, as in the *Baumgartner* case, the conclusion reached involves "broadly social judgments". The *Baumgartner* decision did not hold that a finding as to whether the defendant in that case was willfully false in his oath of allegiance, which was a matter of intent and was the point there in controversy, was not a question of fact; it held rather that it was the kind of finding which this Court would undertake to review.

On only one specific point does the prevailing appellate opinion assert a conflict between the established "subsidiary" facts and the trial court's finding as to the purpose of the terminal operations; and in this one instance it proceeds on a misunderstanding both of the evidence and of the petitioners' contention.

It is said (R. 994) that the petitioners claim that the adding of tetraethyl lead at the terminal "is necessary to insure safe transportation of the gasoline by the pipe line, because tetraethyl lead is dangerous to human beings" and that "there was no evidence that it was dangerous to handle when mixed with gasoline." The latter statement is entirely correct; there is no such evidence. But the former statement is entirely incorrect; at no time have the petitioners asserted that it is not safe to transport leaded gasoline by pipeline.

What the petitioners have contended and what the evidence clearly establishes (R. 284 (851-3)) is that Great Lakes, when it entered upon the pioneer undertaking of long-distance transportation of gasoline, was uncertain as to what effect upon employees' health repeated or prolonged exposure to leaded gasoline might have, and hence, as a precaution, adopted and since has adhered to the policy of not moving leaded gasoline. This policy gave the employees the benefit

of any doubt which might have existed, which surely was the humane and commendable view. But there is absolutely nothing in that fact that militates against a finding that the adding of lead at the terminal facilitates transportation; the exact contrary is the case.

Suppose, however, that the carrier was more cautious than it needed to be. What significance can that possibly have upon the ultimate issue? It was not the function of the Minnesota Supreme Court to view the case in the capacity of pipeline engineers and say that it was unreasonable humanitarian policy to shield employees from an exposure the possible consequences of which were uncertain in the carrier's mind. Furthermore, it must be remembered that the policy was the carrier's, not the shippers', and that only by conforming could the latter avail themselves of the facilities which the carrier had to offer.

In any event, there remains the problem, in the interest of economical operation, of limiting so far as possible the kinds of gasoline carried through the pipeline. Almost at the very outset the majority opinion below makes the statement (R. 991) that tetraethyl lead is added to all gasoline reaching the terminal. This is error. In the early years no lead whatever was added to so-called third-grade gasoline, and lead was added to only a part of it in the later years. (Finding 12d as amended, R. 980 (2939).) Third-grade leaded and third-grade unleaded gasolines constituted two different specifications, despite the fact that (except for color added to the former) the only difference between them was the presence of lead in the one and its absence in the other. Had the lead been added to the one at the refinery instead of at the terminal, the result (the question of carrier health-policy aside) would have been a less economical operation by increasing by one the kinds of gasoline moved through the pipe. In the face of this fact it may not reasonably be said

that there is no basis for a finding that the adding of the lead at the terminal had no possible relation to facilitating transportation.

Respectfully submitted,

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December 1944

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 767

CONTINENTAL OIL COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

MID-CONTINENT PETROLEUM CORPORATION, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

SINCLAIR REFINING COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

PHILLIPS PETROLEUM COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

SKELLY OIL COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

THE TEXAS COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

CITIES SERVICE OIL COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

BARECO OIL COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF IN OPPOSITION.

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Dated January, 1945.

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vs.

STATE OF MINNESOTA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF IN OPPOSITION.

QUESTION PRESENTED.

Whether gasoline shipped from Oklahoma, Kansas and Missouri to the terminus of the Great Lakes Pipe Line Company in Ramsey County, there to be processed and manufactured into a marketable product—then to be stored indefinitely to await the receipt of orders from the petitioners' bulk stations or contract customers, 75% of which come from Minnesota—has come to rest so as to have a situs for taxation.

STATUTES INVOLVED.

The statute under which the tax in question was levied is Minnesota Statutes 1941, Section 272.01 (Mason's Minnesota Statutes 1927, Section 1974 and reads as follows:

> "All real and personal property in this state, and all personal property of persons residing therein, including the property of corporations * * *, is taxable, except such as is by law exempt from taxation;"

Also Minnesota Statutes 1941, Section 273.01 (Mason's Minnesota Statutes 1927, Section 1984), which reads as follows:

> " * * * personal property shall be listed and assessed annually in reference to its value on May 1 * * *".

Also Minnesota Statutes 1941, Section 273.02 (Mason's Minnesota Statutes 1927, Section 1985), which reads as follows:

> "If any * * * personal property be omitted in the assessment of any year or years, and the property thereby escapes taxation, when such omission is discovered

the county auditor shall enter such property on the assessment and tax books for the year or years omitted; and shall assess the property, and extend against the same on the tax list for the current year all arrearages of taxes, properly accruing against it * * *".

STATEMENT.

Petitioners, in order to provide a large stock of gasoline from which to supply bulk stations in the Northern area, made shipments of a minimum of 50,000 barrels each (2,100,000 gallons) via the Great Lakes pipeline to its tank farm at the terminal in Ramsey County consigned to themselves as consignees. (Finding No. 4, R. 887, f. 2661; finding No. 14, R. 989, f. 2693; R. 300 and 301, f. 900-902; R. 414, f. 1240, 1241; R. 994, f. 995). As the gasoline reached the terminal it was allocated to the several shippers by the Great Lakes. (Finding No. 12, R. 894, f. 2682; finding No. 15, R. 989, f. 2694).

Further movement of the gasoline by rail could not be undertaken, not because tank cars were unavailable (R. 1002, f. 1005), but because (1) the gasoline was not then a marketable product—and Great Lakes was required to blend the gasoline with various products including tetra ethyl lead (Finding No. 8, R. 891, f. 2672-2673) resulting in production of 26 different kinds of gasoline, the latter operation requiring originally 16 to 24 hours, but in later years, six hours (R. 897, f. 2689, Finding No. 12d) and (2) to retain the gasoline in storage until petitioners gave shipping instructions. (Finding No. 12, R. 894, f. 2682). Reshipment was not made until petitioners received orders from their own or customers' bulk stations or for "spot"

sales. 75% was shipped to points in Minnesota (R. 992-993, f. 993, Finding No. 17, R. 900, f. 2699-2700).

When the gasoline was delivered to Great Lakes, neither the shipper or carrier knew to whom any part thereof was destined. The only destination known or ascertainable was the pipeline terminal. Ultimate destination was unknown until after orders were received (Finding No. 14, R. 898, f. 2693; R. 300-301, f. 900-902; R. 414, f. 1240, 1241; R. 994, f. 995).

The taxes in question were non-discriminatory. (R. 994, f. 996).

Other undisputed material facts, not mentioned in the trial court's findings, but which must be considered in determining the purpose of the interruption are:

Indefinite storage was contemplated. The tariffs permitted 90 days free storage at the terminal. (R. 874, f. 2622). The tank farm at the terminal had a capacity of 621,000 barrels (about 26,000,000 gallons) (R. 535, f. 1604, R. 991, f. 992). The average storage of shipments was 35 days (R. 307-308, f. 921, 922; R. 992-993, f. 993-994).

The gasoline in stock at the terminal was not committed to the first orders to be received. The traffic department of each petitioner reserved the right to determine as it received orders, whether they should be filled from the terminal stock or from the stock at one of its refineries. (R. 272-273, f. 816-818; R. 633, f. 897-898; R. 638-639, f. 1914-1916; R. 687, f. 2060; R. 688, f. 2062; R. 695, f. 2084; R. 761, f. 2283; R. 788, f. 2362; R. 806, f. 2416; R. 824, f. 2470).

During the winter months, petitioners, encouraged by Great Lakes, made shipments beyond their requirements

in order to keep the pipeline employed and to build up stocks at the terminal for busier seasons. (R. 315, f. 943).

The Interstate Commerce Commission in evaluating Great Lakes properties for rate making purposes determined:

> "This extra handling of gasoline is a manufacturing or trade service rather than a transportation service. Accordingly, all property owned by the carriers and used in blending gasoline has been classified in this report as owned but used for purposes other than those of a common carrier." (R. 850, f. 2548; R. 992, f. 993).

The tank cars were furnished by petitioners. Railroads do not provide them (R. 604, f. 1810-1811). The shipment by rail is made as a separate shipment under a regular bill of lading. (R. 993, f. 994.)

The railroads were not parties to the arrangements whereby Great Lakes made rebates to petitioners to equalize its rates with the all-rail rate. (R. 611, f. 1833).

Shipments for Phillips, Texas and Sinclair were shipped and stored separately and were not commingled (R. 500, f. 1500; R. 517-518, f. 1551-1552).

The State Supreme Court concluded that the gasoline came to rest at the tank farm and rejected trial court's finding No. 18 (R. 900-901, f. 2700-2701) that the interruption at the terminal and the blending operations were not intended to serve the business purposes of petitioners but were designed and intended to facilitate operation of the pipeline because such findings are "opposed to the undisputed facts and are but inferences in the nature of conclusions made by the trial court by applying to them what it conceived to be applicable rules of law. Such findings are not entitled to any more weight than a conclu-

sion of law made by the trial court." (R. 1003-1004, f. 1006-1007).

ARGUMENT.

I.

JURISDICTION.

Jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code (28 USCA, Section 344) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court (Rec. 990) violates the commerce clause of the United States Constitution. It is not shown that the question has not heretofore been determined nor is it claimed that the decision is in conflict with the holdings of this court. *They merely express a doubt. But cite no decision upon which they rely.* On the other hand respondent cites in this brief ample authority to prove a complete accord with such decision.

That the gasoline was in storage with the pipeline for processing and to await receipt of orders at the time the tax was levied does not present a new question. A state tax was sustained under the same circumstances in *Phillips Pipeline Co. v. State,* 302 U. S. 642, 82 L. Ed. 499, affirming 339 Mo. 459, 97 S. W. 2nd 109; and *Susquehanna v. South Amboy,* 228 U. S. 665, 57 L. Ed. 1015. Cf *Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa,* 233 U. S. 334, 58 L. Ed. 988, where the coal was still in the railroad car.

State taxation of property moved by pipeline is not new to this court. *Phillips Pipeline Co. v. State,* Supra; *Eastern Ohio Gas Co. v. Tax Commission,* 283 U. S. 468, 75 L.

Ed. 1171. The test as to when interstate commerce ends and intrastate commerce begins is the same regardless of the means of transportation.

Whether the findings of fact which are mixed findings of fact and conclusions of law or purely conclusions of law are binding upon the State Supreme Court is a state question. The State Supreme Court determined that it is not binding. (R. 1003-1004, f. 1006-1007.) This court is concerned only with findings and conclusions sustained by the State Court and whether such findings or conclusions have support in the record. That the decision of the court is so supported is conceded in the dissent:

> "Careful examination of the voluminous testimony indicates that the trial court might have found that such delays and interruptions were for the benefit of the shipper rather than the carrier and hence the oil stocks were subject to local taxation." (R. 1009, f. 1012)

II.

The blending and storage of gasoline at pipeline tank farm served the business purposes of the petitioners.

The court's decision that the property came to rest at the tank farm so as to become a part of the mass of property within the state and subject to state taxation was founded upon the ground that before the shipment to further destination could be made, the gasoline had to be processed and manufactured into a marketable product and then stored at the tank farm for an average of 35 days while awaiting the receipt of orders. In other words, the tank farm was made a facility of business for the benefit of the peti-

tioners. Among the benefits resulting to petitioners were the following:

1. *It resulted in a tremendous savings in capital investment because it reduced to a very large extent the number of tank cars required to serve its customers.*

The railroads do not provide tank cars. The haul by rail from Kansas City to St. Paul is six days. (Finding No. 14, R. 898, f. 2693) Therefore each tank car would be enroute twelve additional days more than when the movement by rail is from the terminal, which is probably twenty-four hours from any point of delivery.

2. *It provides greater flexibility in operation of refineries and distribution of gasoline.*

The tankage facilities of each petitioner are increased by such facilities at the pipeline tank farm. When an order is received, the traffic department of petitioners have a choice in that they are free to determine whether the order should be filled from the stocks at one of the refineries or from the stocks at the terminal—*and the decision was not made until after the receipt of the order.* Thus when the refineries are stocked to capacity or near capacity, an order could be shipped by all rail—otherwise from the tank farm.

3. *It provided a supply depot close at hand to all customers in the northern area.*

Tankage facilities of bulk stations is limited. (R. 891, f. 2671) All customers are within twenty-four hours reach of the pipeline tank farm and can be readily supplied in any emergency.

4. *Petitioners save the labor costs by having blending with tetra ethyl lead and other products done at the pipeline terminal.*

5. *The tank farm provides a convenient place to make distribution of the bulk shipments via the pipeline into the smaller allotments to be shipped to the bulk stations after orders have been received.*

The essence of petitioners' claim is that the blending activities at the terminal were necessary to facilitate transportation—to make it possible to transport greater volume than if the blending were performed in advance of shipment. Therefore interruption of the movement for this purpose was incidental and excusable. Our answer is that:

1. The gasoline could have been transported beyond the terminal without blending—but that would not serve the business interests of petitioners;

2. Blending of fluids constitutes manufacturing (*Murphy v. Arnson,* 96 U. S. 131); and manufacturing is a local business subject to local regulation and taxation regardless of its effect upon transportation (*Oliver Mining Co. v. Lord,* 262 U. S. 172; *American Mfg. Co. v. St. Louis,* 250 U. S. 459).

Petitioners fail to mention trial court's finding No. 17 (R. 900) that the gasoline was stored until orders were received. *It cannot be argued that indefinite storage for this purpose facilitated transportation.* There was neither necessity nor purpose to send the gasoline through to the bulk stations or customers by immediate continuity—but to store it to await orders. This certainly served the business purposes of petitioners.

III.

The decision is in accord with the Holdings of this Court.

In every instance when the movement of property in interstate commerce was interrupted to permit processing or manufacturing or storage to await the receipts of orders, the state's right to tax has been sustained by this court.

The identical case is *State v. Phillips Pipe Line Company*, 302 U. S. 642, 58 S. Ct. 53, 82 L. Ed. 495, affirming 97 S. W. 2nd 109. There shipment was made under *identical tariffs*, the gasoline to be blended and processed and stored as in the instant case except that *after such blending, processing and storage, and not before*, the gasoline was transferred to a tank under the control of the shipper and transportation to some 200 cities was thereafter continued by truck instead of by rail. In all other respects the case was the same. It was there held that the interstate movement terminated *upon the arrival of the gasoline at the pipe line terminal* and before the processing, manufacturing and storage commenced.

There as here, it was urged that the blending operation facilitated operations of the pipeline; it would enable them to expand the number of grades of gasoline to be shipped from the terminal and meet railroad competition; that it is dangerous to transport leaded gasoline (which this court found to be untrue in *Ethyl Gasoline Corp. v. U. S.*, 309 U. S. 436); that they "would lose custom" in absence of blending. All these claims were considered and rejected. The court held that the blending and storage operations at the terminal, prior to delivery to the shipper

constituted intra-state commerce. As a result the Pipeline Company was subject to the tax.

The case is parallel even if the tax was not on the shipper, since its validity turned upon the property coming to rest as it arrived at the terminal.

The local activities in the Phillips case and in the case at bar present a much stronger basis for state taxation than *Eastern Ohio Gas Co. v. Tax Commission,* Supra.

It seems to us that the following are controlling cases:

Susquehanna Coal Co. v. City of South Amboy, 228 U. S. 665, 668; 33 S. Ct. 712, 714, 57 L. Ed. 1015, 1016,

where it was said of the storage of coal in the yards of the railroad company for the purpose of keeping a supply on hand *to fill anticipated orders* that

> "there was something more than the submission to delay in transportation and the acceptance of its consequences. The situation was made a facility of business,—a business conducted (as here) through agents and employees,"

and

Atlantic Coast Line R. Co. v. Standard Oil Co., 275 U. S. 257, 269; 48 S. Ct. 107, 110, 72 L. Ed. 270, 275,

where oil transported in ships was unloaded into tanks for ultimate delivery to the oil company's bulk stations and contract customers as in the instant case, Mr. Chief Justice Taft said:

> "*There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation.* [to its 123 bulk stations] * * * Everything that is done after the oil is deposited in the storage tanks at the Tampa destination, or at the Jacksonville destination

is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it." (Italics supplied.)

Other authorities supporting this proposition are: *General Oil v. Crain,* 209 U. S. 11, 28 S. Ct. 475, 52 L. Ed. 754. *Chicago, M. & S. T. Ry. Co. v. Iowa,* 233 U. S. 334, 34 S. Ct. 592, 58 L. Ed. 988. *Bacon v. Illinois,* 227 U. S. 504, 33 S. Ct. 299, 67 L. Ed. 615. *So Pac. Co. v. Gallagher,* 306 U. S. 167, 99 S. Ct. 399, 83 L. Ed. 586. *State of Minnesota v. Blasius,* 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131. *State ex rel Burr v. Seaboard,* ALR Code, 92 Fla. 61, 109 So. 656. *Utah Power & Light Co. v. Pfost,* 286 U. S. 165, 76 L. Ed. 1038, and other familiar cases too numerous to mention.

The law governing the facts in this case is so well settled, no purpose would be served in issuing a writ of certiorari.

IV.

The decision is sound.

The decision did not turn upon the problem of moving the gasoline *away from* the terminal but did turn *upon the activities at the terminal tank farm* as a basis for determining that the interstate movement had ended. The Court declared that: (1.) The terminal tank farm is the only destination known. (2.) Interruption was not due to lack of transportation facilities. Rail transportation for further movement was available. (3.) The gasoline could not be moved until processed. It was unmarketable

as shipped. (4.) It had to be stored to await orders. Average storage was 35 days. (5.) It agreed with the Interstate Commerce Commission that the blending of gasoline with tetra ethyl lead and other products, and the indefinite storage thereof was a *manufacturing or trade service and not transportation.* (6.) That this served the business interests of the petitioners.

A. Failure to know ultimate destination in not basis for decision below.

It is one of the many circumstances cited by the Court as evidence of the termination of the interstate movement. The Court said that neither the petitioners nor the carrier *knew* the ultimate destination of the gasoline; and that such *knowledge* was not possible until after *orders* were received. In the meantime the gasoline had to be processed and stored. In all of the cases cited by petitioners the ultimate destination was known at all times. The property was being shipped to *fill* orders *obtained in advance*—and the interruption resulted only from *change of mode of transportation* and while *awaiting the arrival of the means of further transportation.* Only the failure to *designate* ultimate destination in the original bill of lading was excused. But the ultimate destination was at all times ascertainable and known. This was the fact in *U. S. v. Erie R. Co.*, 280 U. S. 94; *Carson Petroleum Co. v. Vial*, 279 U. S. 95 and *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111. Whereas here, the initial shipment was made *in advance of obtaining orders and had to be stored to await the arrival of the anticipated orders* as in *Susque-*

hanna v. South Amboy, Supra and in *Standard Oil Co. v. Atlantic Coastline R. Co.,* Supra.

Apparently movement by pipeline to provide large stocks at the central distribution point to care for anticipated orders is not unlike movement over water by tanker as in the *Standard Oil* case, Supra.

Another important distinction is to be found in the statement of the Court in the *Carson Petroleum* case, Supra: (p. 100, f. 101).

> "The oil is shipped from the storage tanks in the same condition in which it was received from the tank cars without being treated in any way."

In the case at bar the gasoline is an unmarketable product when it arrives at the terminal tank farm. Upon orders of the petitioners it must be processed and manufactured into a marketable product.

B. Trial Court's finding is not conclusive upon the State Supreme Court.

The Supreme Court declared that the "local activities" at the terminal tank farm served the business purposes of the petitioners and that

> ':"The findings that the processing and storage facilitated interstate transportation are opposed to the undisputed facts and are but inferences in the nature of conclusions made by the trial court by applying to them what is conceived to be applicable rules of law. Such findings are not entitled to any more weight than a conclusion of law made by a trial court." (R. 1003, f. 1006-1007)

Obviously this relates to a matter of local practice which will not be reviewed by this Court. *John v. Paullin,* 231 U. S. 583, 585; *Lee v. Central Georgia R. Co.,* 252 U. S. 109, 119; *Central U. Teleph. v. Edwardsville,* 269 U. S. 190, 194, 195; *American Railway Exp. Co. v. Kentucky,* 273 U. S. 269, 272; *Bell Teleph. C. v. Pennsylvania,* 309 U. S. 30, 32. Certainly the *determination* of the purpose of the interruption is the ultimate *conclusion* to be drawn from the *facts.* If appellate courts were concluded by such a finding by the trial court, appeals would be futile. *Baumgartner v. U. S.,* 322 U. S. 665. If this court has jurisdiction, it extends only to review the decision and to determine whether it has support in the record.

The decision is not in conflict with the *Blasius case,* supra. There the trial court's finding of the shipper's intent was set aside by the State Supreme Court. This was not considered erroneous state practice or error. The conclusion was reversed by this court because it was not supported by the record. In the instant case, even the minority opinion concedes there is adequate support.

No criticism of the court's statement concerning blending of gasoline with tetra ethyl lead is justified since 90% of all shipments were "regular" gasoline (R. 532, f. 1594) which was so blended (R. 525-6, f. 1575-6; R. 528-9, f. 1584-7).

CONCLUSION.

We respectfully submit that petitioners have failed to justify a review on writ of certiorari. It clearly appears that the question has heretofore been determined by this court and that the decision is in accord with applicable decisions of this court.

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Dated January, 1945